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(1)

Supreme Court, U.S.

FILED

JUN 30 1988

JOSEPH F. SPANIOL, JR.  
CLERK

NO. \_\_\_\_\_

IN THE SUPREME COURT  
OF THE UNITED STATES

OCTOBER TERM, 1987

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JAMES W. MISLIVECEK,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

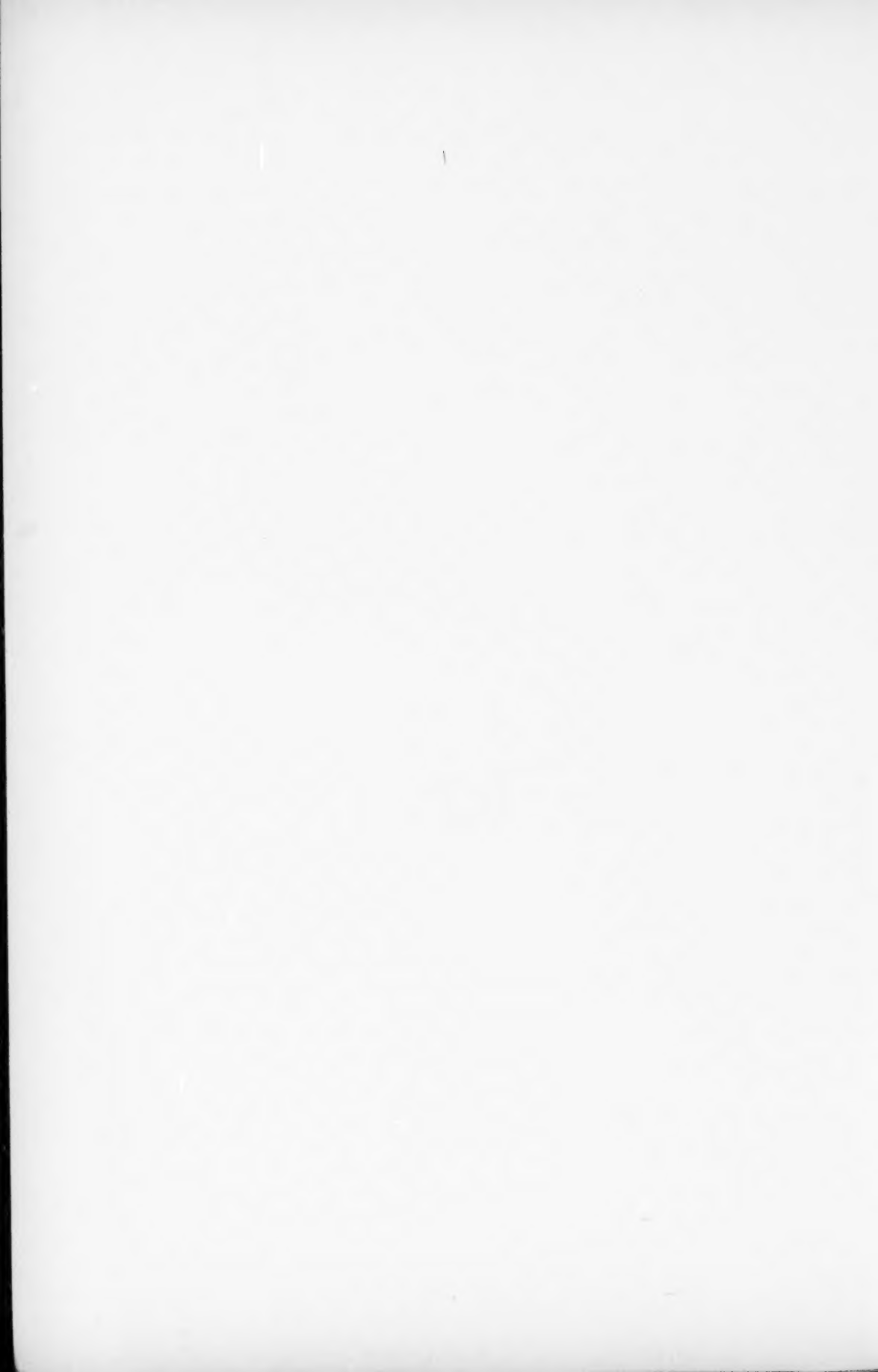
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PETITION FOR A WRIT OF CERTIORARI TO  
THE WISCONSIN COURT OF APPEALS  
FOR THE FOURTH DISTRICT

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Archie E. Simonson  
106 E. Doty Street  
Suite 320  
Madison, WI 53703  
(608) 255-0236

Counsel of Record



## QUESTION PRESENTED

Does the equal protection clause contained in the Fourteenth Amendment entitle the Petitioner to a jury trial under the Constitution and Statutes of the State of Wisconsin in a driver's license revocation proceeding?

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OPINIONS BELOW

The unpublished decision of the Wisconsin Appellate Court in this case dated February 25, 1988, is reproduced in the Appendix, as is the May 3, 1988, Order of the Wisconsin Supreme Court denying review.

## JURISDICTION

The Order of the Wisconsin Supreme Court denying the petition for review of the Court of Appeals was entered on May 3, 1988.



## CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involving the Fourteenth Amendment is set forth below:

### "ARTICLE XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State when they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

The basic facts are briefly outlined as follows. In essence, the Wisconsin Court of Appeals has upheld as constitutional the Wisconsin trial court's denial of the Petitioner's jury demand notwithstanding an express right to a jury granted by sec. 345.43 Wis. Stats., (1986) and Article 1, Section 5 of the Wisconsin Constitution.

The sole issue on which certiorari is sought involves the denial to the Petitioner of the equal protection of the laws of Wisconsin as guaranteed by the Fourteenth Amendment of the United States Constitution.

The petitioner, James W. Mislivecek, was arrested on January 15, 1987, by the Dane County Sheriff's officer and then charged by the State

for operating a motor vehicle while intoxicated. He refused to take a breathalyzer test as required by s. 343.305(2)(b), Wis. Stats., 1986. He was then issued a notice of intent to revoke.

On January 20, 1987, the petitioner filed a request for a hearing on his revocation, demanded a jury and did deposit the required jury fee, all as required by Wisconsin Statute s. 345.43 (1986). The trial court on June 2, 1987, by memorandum decision, refused that request.

Thereafter on June 25, 1987, the petitioner filed for a supervisory writ of mandamus with the Court of Appeals for Wisconsin, District IV for a jury. On July 3, 1987, the petition was denied on the grounds that the

petitioner had the right to raise that issue on appeal of the final judgment in the proceedings.

In 1986, proceedings in Wisconsin to revoke one's driver's license under the implied consent statute were judicial, not administrative as in some other states, such as Massachusetts. Specifically, sec. 343.305(8)(a), Wis. Stats., provides for a hearing before the Court to determine whether or not the arresting officer had probable cause to believe the Petitioner was operating a motor vehicle while under the influence of an intoxicant to a degree rendering him incapable of operating his vehicle safely.

On August 28, 1987, an evidentiary hearing was held in accordance with s. 343.305(8), Wis. Stats., 1986. The

State presented one witness, that being the arresting officer, who testified that when she was following the petitioner her attention was directed to his vehicle by reason of fluctuating speed between 45 and 65 miles per hour and deviating within his own lane of travel.

She also testified that on one occasion the petitioner's vehicle's left tire crossed over the centerline. She then decided to make a vehicular stop based on the crossing over the centerline. She testified that there was no other traffic on the road. She also testified that she observed the petitioner slow to make a left-hand turn without activating his left turn hand signals.

After the stop the officer testified that she conducted field sobriety tests and made certain observations therefrom.

The Petitioner and his wife testified and put in dispute the issues involving the fluctuating speed, deviating within the lane, crossing over the centerline and not activating the left turn signals and the field test results. Specifically, the petitioner and his wife testified that if there was fluctuating speed it was because of the necessity to slow down for the curves and other conditions of the road. They further testified that the deviation within the lane was due to the road conditions and that the left turn signals were definitely used.

The petitioner further testified that his manner of speaking does sound like slurring as was evidenced by his testimony in court. He testified his steadiness was influenced by the fact that he was wearing high-heeled cowboy boots at the time of taking the tests and that one of his legs had fallen asleep.

The trial judge found that the officer had probable cause to believe the petitioner was operating a motor vehicle while under the influence of intoxicants to a degree rendering him incapable of safely operating a motor vehicle and did enter an order of revocation on September 1, 1987, for a period of one year. The judge explained on the record his function was merely to determine the plausibility of the

officer's observations without considering credibility, weight of the evidence or burden of proof.

Thereupon, the petitioner duly filed an appeal on several issues, including the denial of the petitioner's request for a jury trial. The Appellate Court of Wisconsin, District IV affirmed the trial court. The State Supreme Court denied review.

#### **REASONS FOR GRANTING THE WRIT**

##### **I.**

This Court has repeatedly held that the guiding principal most often stated is that the constitutional guarantee of equal protection of the law requires that all persons shall be treated alike under like circumstances



and conditions. Hartford Steamboiler  
Inspection and Ins. v. Harrison, 301  
U.S. 459, A 1 L. Ed. 1223, 57 S. Ct.  
838.

Article 1, Section 5 of the  
Wisconsin Constitution provides:

"s. 5. Trial by Jury;  
verdict in civil cases

Section 5. The right of  
trial by jury shall  
remain inviolate, and  
shall extend to all cases  
at law without regard to  
the amount in  
controversy; but a jury  
trial may be waived by  
the parties in all cases  
in the manner prescribed  
by law. Provided,  
however, that the  
legislature may, from  
time to time, by statute  
provide that a valid  
verdict, in civil cases,  
may be based on the votes  
of a specified number of  
the jury, not less than  
five-sixths thereof."

Section 345.43, Wis. Stats., 1986, provides that in a traffic regulation case either party may file a written demand for a jury trial within ten days after the entry of a plea of not guilty and payment of the fee as required by law. Section 345.20(1)(b), Wis. Stats., provides as follows:

"Traffic regulations means s. 346.63(2)(m), a provision of Chapters 194 or 341 to 349 for which the penalty for violation is a forfeiture or an ordinance enacted in accordance with s. 249.06...."

Section 778.01, Wis. Stats., 1986, defines forfeitures to include any penalty in money or goods. Section 778.103, Wis. Stats., 1986, provides that the procedure in Chapter 345 shall be following an action to recover forfeiture, violation of traffic regulations of Chapters 341 through 349, Wis. Stats., 1986.

The utilization of the word "include" in Section 778.01, Wis. Stats. certainly does not limit forfeiture to be money and goods but does the forfeiture of a property such as a driver's license. This Court, as well as the Wisconsin Supreme Court, has ruled that a driver's license is a protectable property interest. Mackey v. Montrym, 443 US 1, 61 L.Ed. 2d 321, 99 S. Ct. 2612; and State v. Nordness, 128 Wis. 2d 15, 381 N.W.2d 300.

In this case the petitioner was accused of violating s. 343.305(1), Wis. Stats., because he refused to take a breathalyzer test. The petitioner timely, and in proper form, filed a written request for a jury trial,

paying the required fee. The trial court denied the request, the court's decision was sustained on appeal, but for different reasons.

The trial court noted that refusal procedures as set forth in s. 343.305, Wis. Stats., are separate and distinct from the prosecution for the offense involving the intoxicated use of a vehicle. Suspension of Operating Privileges of Bardwell, 83 Wis. 2d 891, 266 N.W.2d 618 (1978). The trial court went on to note however that the statutory language of s. 343.305, Wis. Stats., specifically states that the court shall be prepared to hold any requested hearing and the court shall in each case determine the issues. Section 343.305(8)(a) Wis. Stats., 1986. That "court" means "judge" not jury.

The Petitioner argued on appeal that the Wisconsin Implied Consent Code did not define "court". That the word "court" describes an organ of the government consisting of one or several persons called upon and authorized to administer justice. The common law defined a "court" as the place where justice is administered, therefore distinguishing a "court" from an administrative agency. 20 Am. Jur. 2d, Court p. 386; State v. Cannon, (1931) 206 Wis. 374, 240 N.W. 441.

The Court of Appeals did not address this argument in upholding the trial court's jury ruling reasoning that the right to a jury trial as preserved in Article 1, Section 5 of the Wisconsin Constitution is a right as it existed when the constitution was

adopted, that because refusal hearings did not exist in 1848 when the constitution was adopted no right to a jury trial in such proceeding could have been preserved. The Appellate Court also held that a constitutional right to a jury trial extends only to cases at law. A refusal hearing being a "special proceeding", is not a case at law.

The court cited several pre-1976 decisions which were based on s. 260.03, Wis. Stats. That Statute was abolished in 1976 when Wisconsin adopted new rules of civil procedure. Specifically, s. 801.01, Wis. Stats., now provides:

"801.01 Kinds of Proceedings;  
scope of Title XLII-A

(1) Kinds. Proceedings in the courts are divided into actions and special proceedings. "Action",

as used in this title, includes "special proceeding" unless a specific provision of procedure in special proceedings exists.

(2) Scope. The sections in this title govern procedure and practice in circuit and county courts of the state of Wisconsin in all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin except where different procedure is prescribed by statute or rule. They shall be construed to secure the just, speedy and inexpensive determination of every action."

Section 805.01(1) Stats. provides:

"(1) Right preserved. The right of trial by jury as declared in article I, section 5 of the constitution or as given by a statute and the right of trial by the court shall be preserved to the parties inviolate."

Based on the foregoing analysis, the court of appeals' reasoning for denying the petitioner's jury demand clearly was erroneous!

We respectfully submit the Legislature did not intend to distinguish between cases involving violations of Chapters 343 and those involving violations of the other Chapters 341 through 349. Quite possibly the Legislators could make such a distinction without violating equal protection guarantees. If so, the statutory language would have to be very explicit and unambiguous. It is for the Legislators to make such a distinction, not the judiciary.

The Wisconsin Legislature, in s. 345.43, provides for jury trials to those charged with violating Chapters 341 to 349 of the traffic code. Specifically, Chapter 341 of the Wisconsin Motor Vehicle Code deals with



registration of vehicles. Chapter 342 is entitled Motor Vehicle and Anti-Theft Law. Chapter 343 is entitled Operator's Licenses. Chapter 344 is entitled Vehicles-Financial Responsibility. Chapter 345 is entitled Vehicles-Civil and Criminal Liability. Chapter 346 is entitled Rules of the the Road. Chapter 347 is entitled Equipment of Vehicles. Chapter 348 is Vehicles-Size, Weight & Load. Chapter 349 is entitled State and Local Powers.

The Court of Appeals has ruled that those who have violated the foregoing chapters, with the exception of Chapter 343 are entitled to a jury trial if a demand is made and the fee paid, even though the legislature did not expressly so provide. Consequently, the petitioner in this case has been

denied the equal protection of the laws of Wisconsin as guaranteed by the Fourteenth Amendment to the United States Constitution.

Furthermore, where a right to trial by jury has been established under State law, the State cannot deny the petitioner that right without violating even the minimal standards of due process. Klimas v. Mabry, (1979, CA8 Ark.) 599 F.2d 842. The Wisconsin Legislature, having granted the petitioner the right to trial by jury, the denial of that right by the judiciary resulted in a violation of the petitioner's guaranteed due process of law under the Fifth Amendment of the United States Constitution and his

right to a jury under Article 1,  
Section 5 of the Wisconsin  
Constitution.

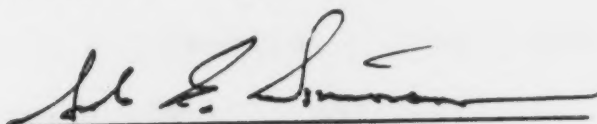
This court should grant this  
petition, issue a writ of certiorari to  
the Wisconsin Court of Appeals,  
District IV and should summarily  
reverse the decision of that court.

#### CONCLUSION

For the above reasons the petition  
for writ of certiorari should be  
granted.

Dated this 24<sup>th</sup> day of June,  
1988.

Respectfully submitted,



Archie E. Simonson  
Attorney for Petitioner  
106 E. Doty Street  
Madison, WI 53703  
(608) 255-0236

## APPENDIX

### PAGE

Decision of the Court of Appeals  
Dated 2/25/88.....100

Order Denying Petition for Review  
By Wis. Sup. Ct. 5/3/88.....108

No. 87-1661

STATE OF WISCONSIN    IN COURT OF APPEALS  
DISTRICT IV

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STATE OF WISCONSIN,

Plaintiff-Respondent

v.

JAMES W. MISLIVECEK,

Defendant-Appellant.

---

APPEAL from an order of the  
circuit court for Dane county: GEORGE  
A.W. NORTHRUP, Judge. Affirmed.

GARTZKE, P.J. James Mislivecek  
appeals from an order revoking his  
driving privileges for failure to  
submit to a chemical test for  
intoxication. Sec. 343.305(3)(b),  
Stats. The appeal is decided by one  
court of appeals judge. Sec.

752.31(2)(c), Stats. The issues are whether the officer unlawfully stopped Mislivecek's pickup truck; whether sec. 343.305(3)(b)5.a., Stats., is unconstitutional; and whether Mislivecek is entitled to a jury trial. The answer is no to each question. We affirm.

Mislivecek asserts that because the officer lacked probable cause, the stop violated the fourth amendment to the United States Constitution, sec. 968.24, Stats., (Wisconsin's investigatory stop statute) and art. I, secs. 8 and 11 of the Wisconsin Constitution. We disagree.

The officer testified that on January 15, 1987, the erratic speed of Mislivecek's pickup truck drew her attention. The speed fluctuated from 45

to 65 miles per hour. The pickup deviated within its own lane of travel. On occasion its left tires crossed the center line into the other lane. After Mislivecek turned left at an intersection without signaling the turn, the officer stopped his truck because it was violating the traffic laws. The court concluded on the basis of the police officer's observations that probable cause existed to stop Mislivecek's vehicle. We are entitled to infer from that conclusion that the court found the facts to be as the officer described them. See Sohns v. Jensen, 11 Wis.2d 449, 453, 105 N.W.2d 818, 820 (1960) (appellate court may assume missing findings were determined in favor of judgment).

An officer may stop a vehicle even if the officer lacks probable cause to arrest. State v. Guzy, 139 Wis.2d 663, 675, 407 N.W.2d 548, 554 (1987). The officer need only have a suspicion grounded on specific, articulable facts, and on reasonable inferences from those facts, that the driver has violated the law. Id. Reasonable suspicion that a traffic law has been violated is enough to justify the stop. Delaware v. Prouse, 440 U.S. 648, 663 (1979). The officer had specific and articulable facts on which to reasonably believe that Mislivecek had violated the traffic laws. The stop was constitutional.

Section 968.24, Stats., is consistent with those same constitutional principles. Compliance



with the principles is compliance with the statute. Mislivecek does not contend otherwise.

We turn to Mislivecek's attack upon the constitutionality of the revocation procedure under sec. 343.305, Stats. Subsection 3(b)5. provides in relevant part that "the issues of the [refusal] hearing are limited to: a. Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol,..."

Mislivecek contends that driving privileges may not be constitutionally revoked merely upon a probable cause hearing. In his view, a "full [sic] hearing on the issue of refusal..." is constitutionally required. He apparent-

ly contends that the issue should be whether the driver was in fact under the influence, not whether the officer had probable cause to believe that he was under the influence. However, State v. Nordness, 128 Wis.2d 15, 32, 381 N.W.2d 300, 307 (1986), upheld the constitutionality of the statutory issues in a refusal hearing. The court relied upon the analysis in Illinois v. Batchelder, 463 U.S.1112 (1983). We are bound by supreme court precedent. State v. Lossman, 118 Wis.2d 526, 533, 348 N.W.2d 159, 163 (1984).

Mislivecek's demand for a jury trial was properly denied. The issues in a refusal hearing are tried to the court. Sec. 343.305(9), Stats. The right to a jury trial preserved in art. I, sec. 5, of the Wisconsin Constitu-

tion is the right as it existed when the constitution was adopted. In Interest of N.E., 122 Wis.2d 198, 203, 361 N.W.2d 693, 696 (1985). Because refusal hearings did not exist in 1848, when the Constitution was adopted, no right to a jury trial in such a proceeding could have been preserved. Compare In Interest of N.E. (because juvenile delinquency proceedings did not exist in 1848, no constitutional right to a jury exists in such proceedings); and Burke v. Madison, 17 Wis.2d 623, 635, 117 N.W.2d 580, 586 (1962) (because no right to jury existed in election contest when constitution was adopted, no such constitutional right now exists).

Moreover, the constitutional right extends "to all cases at law." A refusal hearing is a special proceeding. State v. Jakubowski, 61 Wis.2d 220, 223-24 n.2, 212 N.W.2d 155, 156-57 (1973). A special proceeding is not a case at law. See Bekkedal v. Viroqua, 183 Wis. 176, 192, 196 N.W. 879, 885 (1924) (action to set aside special assessment is purely statutory; no constitutional right to jury exists); State ex rel. Allis v. Wiesner, 187 Wis. 384, 395, 204 N.W. 589, 593 (1925) (eminent domain proceeding is purely statutory and not case at law).

We conclude that the order must be affirmed.

By the Court.--Order affirmed.

Publication in the official reports is not recommended.

Office of the Clerk  
SUPREME COURT  
STATE OF WISCONSIN

Hon. George Northrup  
Circuit Court for Dane County  
TO City-County Bldg.  
Madison, WI 53709

Madison, May 3, 1988

Douglas McLean  
Assistant District Attorney  
City-County Bldg.  
Madison, WI 53709

Archie E. Simonson  
106 E. Doty Street, #320  
Madison, WI 53703

The Court today announced an order in  
your case as follows:

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No. 87-1661 State v. Mislivecek  
(T.C.#87 CT 127)

A petition for review pursuant to  
sec. 808.10, Stats., having been filed  
on behalf of defendant-appellant-  
petitioner, James W. Mislivecek, and  
considered by the court,

IT IS ORDERED that the petition is  
denied, without costs.

---

Marilyn L. Graves  
Clerk of Supreme Court